In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-216

OCTAVIO SAENZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to support his conviction of perjury, that the false statements he was convicted of making before a grand jury were not material, and that the grand jury was without authority to investigate the matter it questioned him about.

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of two counts of perjury, in violation of 18 U.S.C. 1623. He was sentenced to concurrent terms of five years' imprisonment on each count and was fined $10,000 plus the costs of prosecution. The court of appeals affirmed (Pet. App. 1a–4a).

Petitioner is the mayor of Benavides, Texas. In May 1972, a federal grand jury in San Antonio commenced

595-169—75——1

an investigation of suspected income tax evasion by George B. Parr, a prominent political figure in the South Texas county of Duval, in which Benavides is located. Included among Parr's activities was that of retained counsel for the Duval County Conservation and Reclamation District ("Water District") (Pat. App. 2a).

The grand jury's investigation had revealed that some of the Water District's bank accounts in the First State Bank of San Diego, Texas, had been used to make disguised expenditures on behalf of Parr. This was accomplished by billing the Water District's accounts for goods and services that had been provided for a large ranch in which Parr had an interest (Tr. 33–34). Among the items provided was $185,000 worth of irrigation equipment purchased from Stewart and Stevenson Services, Inc., of Houston. While most of this equipment was paid for by Water District funds, an initial invoice of $33,007.60 had been paid from funds from the City of Benavides Special Sinking Fund account at the First State Bank (Tr. 37–39, 41).

The Special Sinking Fund contained money originally held in the Mercantile National Bank of Dallas. In 1958, pursuant to federal bankruptcy proceedings, the fund had been established at the Mercantile Bank to provide for the payment of interest on City of Benavides Refunding Bonds of 1958. In 1967, the city's water and sewer systems were sold to the Water District, and the city's bonded indebtedness was paid off and cancelled. Thereafter, the remaining money in this fund, $39,328.05, was placed in a newly established City of Benavides Special Sinking Fund account at the First State Bank (Tr. 120–123, 204–205, 242–243).

The grand jury had interviewed officers of the bank, but they were unable to explain why this city account had been utilized to pay a fraudulent billing to the Water District (Tr. 41–42). Its investigation of the $33,000 expenditure revealed that five days after that disbursement petitioner had withdrawn some $5,000 from the city account (Tr. 43). These two transactions were the only two involving the city account from the time it was opened in 1967 (Tr. 39, 43).

Since petitioner's signature was on the bank card authorizing withdrawals from that account, he was questioned by the grand jury concerning these disbursements. The grand jury wished to determine why the account was established. It suspected that, since petitioner's withdrawal had occurred only five days after the $33,000 disbursement, it might have constituted a payoff to him for authorizing the $33,000 expenditure that had benefited Parr (Tr. 44).

When questioned by the grand jury as to the purpose of the $5,000 withdrawal, petitioner responded that it "was a compensation that was agreed on by the council for my services" (Tr. 158). This response was the basis for the first count of the indictment against petitioner, for the city council had not in fact agreed upon such compensation. City council members testified that the only compensation that they and the mayor were to receive was a $50 Christmas bonus each year plus free utility service (Tr. 202–204, 234–235, 243). Ramiro D. Carrillo testified that the council had never voted further compensation for petitioner (Tr. 208); that no entry in council records reflecting a desire to compensate him had been made

(Tr. 209); and that the council had never authorized petitioner to withdraw any city funds as compensation for himself (Tr. 210). Jose D. Gutierrez testified that petitioner had never discussed with the council the possibility of his receiving compensation for his services (Tr. 234, 236) and that he had never talked about his receiving funds from the sale of the Water District (Tr. 235). L. S. Chapa testified that there had been no discussion concerning further compensation for petitioner (Tr. 244); that no authorization of funds for any member beyond the Christmas bonus had ever been authorized (Tr. 244); and that the $5,000 payment to petitioner had not been authorized or voted upon (Tr. 245).[1]

When questioned by the grand jury about the Special Sinking Fund, petitioner indicated that, while he had signed the account signature card, initiating the account, he was not aware that the $39,000 had been placed in the account or when it had been deposited (Tr. 163, 186–187). He denied that he had instructed the Mercantile National Bank of Dallas to transfer the bond money surplus to the Special Sinking Fund account (Tr. 166). These responses were the basis for the second perjury count. The evidence showed that on March 15, 1967, petitioner had written to the Mercan-

[1] Petitioner testified that "my understanding with the council, our understanding was that if anything was left out of that [the money in the Mercantile Bank] we would compensate ourselves from whatever was left" (Tr. 304–305). The three council members, however, indicated that they did not know what had happened to the Mercantile Bank money and specifically that they did not know that it had been transferred to the First State Bank (Tr. 205–207, 234, 243).

tile Bank and requested the return of all funds remaining in the city's account; two weeks later he had signed a card establishing the City of Benavides Special Sinking Fund account at the First State Bank. On April 5, 1967, a Mercantile Bank officer wrote petitioner and indicated that the Mercantile account had been closed and that the $39,328.05 balance had been transferred to the First State Bank (Tr. 116–117, 118, 149–150).[2]

The grand jury was never able to determine if there had been a connection between Parr and petitioner or between the two withdrawals from the Special Sinking Fund. Parr was later convicted on four counts of attempted income tax evasion and four counts of filing false income tax returns. See *United States* v. *Parr*, 509 F. 2d 1381 (C.A. 5).

1. Petitioner contends that the evidence was insufficient to support his conviction. As our summary of the evidence reveals, however, his testimony before the grand jury was firmly contradicted by the government's evidence at trial. As the court of appeals stated, "[t]he question of credibility was for the jury" (Pet. App. 3a). *Bronston* v. *United States*, 409 U.S. 352, cited by petitioner is inapposite. In *Bronston* a perjury conviction was reversed because the defendant's

[2] At trial, petitioner stipulated that the signature on the March 15 letter was his own; however, he stated that he did not recall ever seeing the letter and that it was not typed by him or under his instructions (Tr. 264–265). He also asserted that he had never seen the April 5 letter advising him of the transfer of funds to the First State Bank account (Tr. 264–265). He denied ever having authorized the $33,000 payment to Stewart and Stevenson Services in Houston (Tr. 269).

response had been literally true and false only by implication. In petitioner's case, his answers were shown to be wholly false.

2. Petitioner also argues that the question whether a false statement was material should be determined by the jury rather than the court and that in any event his false statements were not material. The issue of materiality, however, has always been considered one of law for the determination of the trial court. See *Sinclair* v. *United States,* 279 U.S. 263, 298; *United States* v. *Wesson,* 478 F. 2d 1180, 1181 (C.A. 7); *United States* v. *Gremillion,* 464 F. 2d 901, 905 (C.A. 5), certiorari denied, 409 U.S. 1085. A false statement is material if it has "a tendency to influence, impede, or hamper the grand jury from pursuing its investigation." *United States* v. *Lardieri,* 497 F. 2d 187, 317, 319 (C.A. 3). Proof that the perjury actually impeded the grand jury is not necessary. *United States* v. *Lococo,* 450 F. 2d 1196, 1199 (C.A. 9), certiorari denied, 406 U.S. 945; *Vitello* v. *United States,* 425 F. 2d 416 (C.A. 9), certiorari denied, 400 U.S. 822; *United States* v. *Wesson, supra,* 478 F. 2d at 1181; *United States* v. *Gremillion, supra,* 464 F. 2d at 905.

Petitioner's statements tended to and in fact did impede the grand jury's investigation. Pursuant to its investigation of Parr, the grand jury was attempting to determine why the city had made an expenditure for Parr's personal benefit. Had petitioner truthfully revealed the reason for his withdrawal of $5,000 from the Special Sinking Fund and for his having established the account shortly before the $33,000 disbursement, the matter might have been resolved.

3. Petitioner argues that, because Parr was ultimately tried and convicted in the Southern District of Texas, the grand jury in the Western District—before which petitioner testified—was without jurisdiction over Parr's offenses and therefore that petitioner's perjury was unindictable. This contention was not made by petitioner in the court of appeals and should not be considered by this Court. See *Lawn* v. *United States,* 355 U.S. 339, 362–363, n. 16; *Adickes* v. *Kress & Co.,* 398 U.S. 144, 147, n. 2. In any event, the contention is insubstantial.

In the first place, jurisdiction over Parr's offenses did lie in the Western as well as the Southern District. A prosecution for attempted income tax evasion may be brought either in the district in which the return was mailed or in the district in which it was filed. See 18 U.S.C. 3237. We have been informed by the United States Attorney that, while Parr mailed his returns in the Southern District, they were filed in Austin, which is in the Western District.

A local rule in the Western District provides that "grand juries shall consider only cases triable in the division or divisions from which grand jurors are drawn" (Pet. 10). In this case, because Parr's returns were filed in Austin (in the Austin Division of the Western District) and the grand jury before which petitioner appeared was convened in the San Antonio Division, the initial indictment against Parr was dismissed. Rather than seek reindictment before an Austin Division grand jury, the government chose to seek reindictment of Parr in the Southern District.

Whatever may be the validity of the local rule, it does not confer a license to commit perjury. Whether a grand jury before which a witness is called ultimately has jurisdiction over the offenses it is investigating is immaterial in a perjury prosecution. A grand jury investigation is often designed to determine whether an offense has been committed within its jurisdiction. "It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made." *Branzburg* v. *Hayes,* 408 U.S. 665, 701–702. That the investigation leads to the conclusion that no offense has occured or that an offense was committed in another district does not excuse the commission of perjury before the grand jury that conducted the investigation. "[T]he federal statute against perjury is not directed so much at its effects as at its perpetration; at the probable wrong done the administration of justice by false testimony." *United States* v. *Williams,* 341 U.S. 58, 68.[4]

Petitioner erroneously relies on *Brown* v. *United States,* 245 F. 2d 549 (C.A. 8). In *Brown,* a perjury conviction was reversed on a finding by the court of appeals that a grand jury had been convened without a good faith intent to investigate an offense that

[4] In *Williams*, the defendants were charged with giving perjured testimony during a criminal prosecution brought against them on the basis of an indictment later ruled defective. This Court rejected the contention that their perjury was thus immunized from prosecution. "The circumstance that ultimately it is determined on appeal that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment" (341 U.S. at 66).

might have occurred within its district, but solely to "extract from defendant his testimony * * * knowing that his recollection of it differed from that of * * * others * * * and to get him indicted for perjury" (245 F. 2d at 555).[5] In petitioner's case, by contrast, the grand jury's inquiry was clearly bona fide; there is no indication that, when the inquiry commenced, it was known that the suspected tax offenses under investigation had in fact occurred in another division or that there was a plan to extract perjured testimony from petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

[5] *Brown* has been limited by the Eighth Circuit to circumstances involving bad faith. See *Masinia* v. *United States*, 296 F. 2d 871 (C.A. 8); *LaRocca* v. *United States*, 337 F. 2d 39, 42–43 (C.A. 8).

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